SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

SUMMARY NO. 62

DECEMBER 1954

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

INTERNAL REVENUE SERVICE CLARIFIES ITS POSITION ON THE TREATMENT OF NET OPERATING LOSSES BY COOPERATIVES

Farmer Cooperative Service publication General Report No. 1 contained a statement on the treatment of a net operating loss carry-over which seemed to require some amplification. At the request of that Service, the Internal Revenue Service has furnished the following letter of clarification:

"November 30, 1954

"Dear Mr. ________________:

"This is in reply to your letter of _______________, addressed to Commissioner Andrews, in which you request that the Internal Revenue Service submit a revised statement with respect to the Federal income tax treatment of a net operating loss in the case of an exempt and nonexempt farmers cooperative association.

"The tax treatment of this item in the case of an exempt cooperative is set forth on page 4 of General Report No. 1, entitled "Recent Federal Income Tax Changes Affecting Farmer Cooperatives". The report was approved by the Internal Revenue Service on December 22, 1953; however, it is believed that the tax treatment of a net operating loss deduction, as set forth in the report, does not reflect the present thinking of the Service with respect to the matter.

"The Federal income tax treatment of the net operating loss in the case of exempt cooperative associations has been reconsidered and the following paragraphs are submitted which may be substituted for the third full paragraph on page 4 of the report referred to above.

"'The carry-forward will work as follows: Assume that an exempt cooperative had a net operating loss of $5,000 during 1952. This cannot be carried backward to the year 1951 because the cooperative in that year was fully exempt and therefore had no taxable income. In 1953 the cooperative had a successful operation which resulted in net operating proceeds (net savings) of say $15,000. To effectuate the carry-forward the cooperative may distribute

$10,000 of the net savings to the 1953 patrons (in cash or non-cash form) and deduct the $5,000 loss from the remaining savings thereby reducing the cooperative's net taxable income for the year 1953 to zero. However, the cooperative may desire to distribute a greater part or all of its net savings to its 1953 patrons before applying any of the 1952 loss. Suppose the cooperative desires to distribute $14,000 of its net savings to its 1953 patrons, it would then have a net income of $1,000 before applying the net operating loss carry-over. It would apply $1,000 of the net operating loss to the net income of 1953 and have the balance of $4,000 as a carry-over to the next four succeeding taxable years. In other words the amount of the 1952 net operating loss may be applied against the net income of the next five succeeding years to the extent of the net operating proceeds remaining after the distribution of patronage dividends in such year.'

"'In the case of a non-exempt cooperative, the 1952 net operating loss must be carried back to the year 1951 before being carried forward into the years 1953, 1954, 1955, 1956 and 1957. The amount of the net operating loss to be applied in each year would be determined in the same manner as an exempt cooperative.'

Very truly yours,

(Signed) H. T. Swartz
Director, Tax Rulings Division"

TAXPAYER'S NONENFORCIBLE OBLIGATION NOT DEDUCTIBLE AS BUSINESS EXPENSE

(Union Fishermen's Cooperative Packing Co. v. Meloney, 121 F. Supp. 373)

This was an action to recover income and excess profits taxes paid by the fishermen's cooperative for the years 1944 and 1945. The district court held that where a semi-cooperative corporation, though always desirous of making bonus payments to its fishermen, did not regard itself as obligated to make such payments and refused to obligate itself to make such payments because it feared prosecution by O.P.A. for violating maximum price regulation, it could not, after the statute of limitations had run on possible prosecution, deduct the proposed bonus payment as an ordinary and necessary business expense for income tax purposes.

Excerpts from the opinion follow:

"Plaintiff alleges that it accrued an obligation in 1944 to pay its supplying independent commercial fishermen $9,380.61 more than the ceiling price for the raw fish supplied and that it accrued a similar obligation in 1945 to pay the fishermen $10,472.61. Plaintiff alleges that these amounts, which have never been paid, are properly allocable in such years to either cost of goods sold or ordinary and necessary business expenses. The recovery sought represents the tax refunds which would be allowed if plaintiff establishes that it incurred an obligation to pay such amounts. Defendant denies that such obligations accrued within the meaning of the Internal Revenue Code, 26 U.S.C.A., in either 1944 or 1945.

"Plaintiff was organized in 1896 as a private corporation. While plaintiff has always operated as a semi-cooperative, it has never reorganized as a legal cooperative after the corporation laws of the State of Oregon permitted it to do so. It maintains a plant in the city of Astoria, Oregon. It purchases raw fish from independent commercial fishermen who are free to sell their fish to any packer on the Columbia River. Plaintiff employs and purchases fish from both shareholders and non-shareholders alike.

"A major problem of plaintiff's management after organization was the maintenance of a steady supply of raw fish from independent fishermen. Since plaintiff did not and does not operate its own vessels, it was a business necessity to develop and maintain the loyalty of commercial fishermen. At some date shortly after its organization, plaintiff instituted a policy of distributing at the end of each season bonuses to the fishermen. Plaintiff did not leave the total bonus to be paid all the fishermen to annual determination but, instead, instituted a policy of having the total annual bonus equal the total annual dividends to shareholders, which policy was publicized among all the fishermen on the River. As a result, plaintiff has developed and maintained, over a period of many years, the loyalty of the independent commercial fishermen in the area."

[In addition to custom, plaintiff contended that its liability for 1944 and 1945 accrued pursuant to its bylaws. At this point the opinion quotes the bylaws at some length but, since the court later in the opinion declines to construe them, they are omitted here. The opinion then explains the interposition of the O.P.A. regulations establishing the price of raw salmon and the effect these regulations had on the plaintiff's decision not to pay the bonuses to fishermen in 1944 and 1945.]

"I have carefully examined the extensive documentary evidence and the transcript of the testimony in this action. My conclusion is, in neither year did plaintiff consider the matched bonus as an unqualified, undisputed, fixed and determined liability but, rather, that it has been treated as contingent due to fear of OPA prosecution and of uncertainty of allowance by the Internal Revenue Bureau. The testimony of the fishermen indicates that they acquiesced in plaintiff's obedience to OPA regulations. In neither year did plaintiff's books and records show a contemporary or even subsequent ultimate breakdown as to the division of the matched bonus.

"On this showing plaintiff contends that it should be entitled to deduct these amounts from its income and add them to either the cost of raw fish bought or normal operating expenses. It urges that, in each year, an obligation to pay the matched bonus accrued and, in fact, that it was obligated and did obligate itself to make such payment.

"Plaintiff ably urges that many of the tangential issues raised do not bar its claim.

"It argues that, had it made the bonus payments, the amounts so paid would be deductible. This is probably correct. Anderson Oldsmobile, Inc., v. Hofferbert, D.C.D. Md. 1952, 102 F. Supp. 902, affirmed, 4 Cir., 197 F. 2d 504; Clark v. United States, D.C.N.D. Tex. 1951, 107 F. Supp. 554; Commissioner of Internal Revenue v. Weisman, 1 Cir., 1952, 197 F. 2d 221; Herberger v. Commissioner, 9 T.C.M. 546 (1950), affirmed, 9 Cir., 195 F. 2d 293, certiorari denied 344 U.S. 820, 73 S. Ct. 17, 97 L. Ed. 639.

"Plaintiff contends that its by-laws required it to pay these matched bonuses to its fishermen. The interpretation of plaintiff's charter and by-laws is not here being litigated and need not be decided because, even if such by-laws gave the fishermen enforceable rights, such rights were abrogated by the Emergency Price Control Act of 1942 and the regulations issued pursuant thereto. Only that portion of contractual rights not in violation of the OPA survived enactment of the regulatory legislation. Fleming v. Rhodes, 1947, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368; Brewing Corp. of America v. Cleveland Trust Co., 6 Cir., 1950, 185 F. 2d 482.

"Plaintiff urgesthat its moral obligation to pay such bonuses, combined with the competitive situation on the River, affords a legal basis for the payments of such bonuses for the years 1944 and 1945. While a mere moral obligation might not be deductible, Friedman v. Delaney, 1 Cir., 1948, 171 F. 2d 269, certiorari denied 336 U.S. 936, 69 S. Ct. 746, 93 L. Ed. 1095, a non-enforceable obligation necessitated by commercial competitive reasons may be deductible under certain circumstances. Canton Cotton Mills v. United States, 1951, 94 F. Supp. 561, 119 Ct. Cl. 24.

"Plaintiff admits that such payments might have subjected it to civil or criminal prosecution and penalties but claims that, if a cash basis taxpayer could deduct an illegal cash payment, an accrual basis taxpayer should be able to deduct an illegal accrued obligation.

"It is not necessary to decide any of these contentions because, even though legality, enforceability, and proper accounting may not be requisite to the allowance for tax purposes of payments made or definitely accrued, it is incumbent that the taxpayer show either timely payment or accrual of an obligation.

"The Supreme Court has recently defined the nature of an accrued obligation. In Dixie Pine Products Co. v. Commissioner, 1944, 320 U.S. 516, 64 S. Ct, 364, 365, 88 L. Ed. 420, the Court held that a taxpayer who had successfully challenged the levying of a state gasoline tax on cleaning solvent could not accrue the tax liability in the year of payment because,

> "'It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year. It has long been held that, in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer.' 320 U.S. at page 519, 64 S. Ct. at page 365.

"In Security Flour Mills Co. v. Commissioner, 1944, 321 U.S. 281, 64 S. Ct. 596, 88 L. Ed. 725, the taxpayer in 1935 withheld levies pursuant to the Agricultural Adjustment Act of 1933, 7 U.S.C.A. § 601 et seq., and instituted an action to enjoin collection of the tax, which was declared unconstitutional in January 1936. The Commissioner did not allow a deduction as an accrued obligation of the amounts of tax paid in escrow prior to such declaration of unconstitutionality. In affirming, the Court held, 321 U.S. at page 284, 64 S. Ct. at page 597, that:

> "'* * * a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent, * * *.'

And, 321 U.S. at page 286, 64 S. Ct. at page 599, in discussing principles of accrual, the Court held that:

> "'This legal principle has often been stated and applied. The uniform result has been denial both to government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount.'

"Plaintiff further contends that commercial necessity obligates it to pay the fishermen matched bonuses for the years 1944 and 1945. This may be true, but the question to be decided in this case is whether an obligation to pay these amounts accrued in 1944 and 1945. An obligation does not accrue merely because there is a desire on the part of a taxpayer to make a payment. A taxpayer must unconditionally obligate himself to make the payment.

"The evidence reveals that, although plaintiff was always desirous of making the bonus payments to its fishermen, it did not regard itself as obligated to make such payments. In fact, it refused to obligate itself because it feared prosecution even if it did not make such payments but merely accrued a liability to be discharged in the future. Plaintiff's own books and records clearly establish that in 1945, it considered the obligation, if any, to pay a matched bonus contingent upon permission from the OPA and allowance of a tax deduction.

"On the basis of the testimony of plaintiff's officers and the other evidence introduced at the trial, I am convinced that plaintiff, during the years in question, did not obligate itself to make such payments because it knew that it was illegal for it to pay, or agree to pay to its fishermen, a bonus in addition to the OPA maximum price for raw fish. After the statute of limitations has run and plaintiff is no longer in danger of prosecution, it cannot translate a mere hope or desire into an obligation within the meaning of the Internal Revenue Code."

DECISION ON TORT IMMUNITY OF SOUTH CAROLINA REA COOPERATIVE REVERSED

(Byrd v. Blue Ridge Rural Electrical Cooperative, 215 F. 2d 542)

The decision of the United States District Court (118 F. Supp. 868), reported in Summary No. 61, p. 16, that a nonprofit membership cooperative operating under the South Carolina Rural Electric Cooperative Act is immune from tort liability was reversed by the U. S. Court of Appeals, Fourth Circuit, on September 2, 1954.

The lower court abstained from a specific holding that a cooperative is a charitable organization but held that its nature is such that it must be given the exemption from tort liability for the same reasons that it is accorded to charitable corporations. On this point, the Circuit Court said, in part:

> "We think that the judgment cannot be sustained unless the Cooperative is truly a charitable corporation under the law of South Carolina, because these bodies are the only corporations, other than governmental or public bodies, that are exempt from liability for tort under the decisions of that state.
>
> * * * * * *
>
> "Obviously a rural electric cooperative is not designed to accomplish the beneficial purposes in the public interest which a charitable association in the accustomed sense, such as a church, college or hospital, is organized to serve. It does not belong to the same category. It is essentially a business project designed to promote the convenience and material welfare of its members rather than the common good. Rural electrification has added much to the comfort of residents of rural areas and this worthy purpose has been advanced by the federal government through the loan of funds under the Federal Rural Electrification Act, 7 U.S.C.A. § 901 et seq., and by the State of South Carolina in relieving the organizations of certain governmental controls and of certain taxes. The statutes of the State, however, do not specifically grant exemption from liability for tort, and we do not think that we are justified in relieving them of a burden which inevitably attends the operation of a public utility and is regarded as an operating

> expense under modern conditions. The fact that the members of the association seek no profit as such, other than the enjoyment of electric service, does not transform the business venture into a charitable enterprise."

The cooperative made the further contention that it must be considered a charitable corporation because its special tax status only could be sustained constitutionally on the theory that the legislature was exercising the power conferred by the Constitution to exempt property used for charitable purposes. On this issue the court said, in part:

> "There is no merit in these contentions. It is not necessary to invoke the constitutional power to exempt from taxation property used for charitable purposes in order to sustain the statutes which exempt the property of rural electric cooperatives. It is well settled in South Carolina that the power to prescribe what property shall be taxed implies the power to prescribe what property shall be exempt from taxation, and that in the absence of a constitutional provision to the contrary, the legislature may exempt such classes of property as in its opinion the public policy of the state requires. It is likewise settled that every presumption must be adjudged in favor of such legislative action and it must not be declared invalid unless the conflict with the constitution is irreconcilable. . . .
>
> ". . . . That the rural electric cooperatives serve a beneficial public purpose in South Carolina is a concession in this case and their exemption from taxation is accordingly justified on this ground.
>
> "It cannot be said that the exemption violates the provisions as to uniformity of taxation contained in Art. 10 §§ 1 and 5 of the State Constitution or the due process or the equal protection clauses of the 14th Amendment to the Federal Constitution. The fundamental rule is that the State legislature has the right to make reasonable classifications of persons and property for taxation purposes. It is elementary that if the classification bears a reasonable relation to the legislative purpose sought to be effected, and if all the members of each class are treated alike under similar circumstances, the equal protection clauses of the Constitutions are fully complied with."

PROVISION AUTHORIZING DIRECTORS TO CALL COMMON STOCK FOR PURCHASE OR RETIREMENT UPHELD

(Lewis v. H. P. Hood & Sons (Mass.), 121 N.E. 2d 850)

This decision, although not involving a cooperative, may be of interest to cooperatives since it sustains a restriction on common stock ownership sometimes found in cooperative articles of incorporation or bylaws, or both.

The articles of organization of H. P. Hood & Sons contained a provision authorizing the board of directors to call outstanding common stock for purchase or retirement. Pursuant to this provision, the board established the policy of calling and retiring the stock of retired employees. This action was brought by a stockholder who was also a retired employee to enjoin the corporation from enforcing the provision. The lower court held that the provision was not invalid and entered decree for the corporation. The stockholder appealed. The Supreme Judicial Court of Massachusetts affirmed the decree.

The pertinent provision of the articles was as follows:

> ". . . '(7) By unanimous vote of a full board of directors of the number fixed by the stockholders at their last annual meeting, all or any shares of common stock of the corporation held by such holder or holders as may be designated in such vote may be called at any time for purchase, or for retirement or cancellation in connection with any reduction of capital stock, at the book value of such shares as determined by the board of directors as of the close of the month next preceding such vote. Such determination, including the method thereof and the matters considered therein, shall be final and conclusive. (8) Not less than 30 days prior to the day for which a call of * * common stock for purchase or for retirement or cancellation is made, notice of such call shall be mailed to each holder of shares of stock called at his address as it appears upon the books of the corporation. The corporation shall, not later than said day, deposit with a * * * [bank] to be designated in such notice, for the account of such holder, the amount of the purchase price of the shares so called * * *. After such notice and deposit all shares so called shall be deemed to have been transferred to the corporation, or retired or cancelled as the case may be, and the holder shall cease to have, in respect thereof, any claim

to future dividends or other rights as stockholder, and shall be entitled only to the sums so deposited for his account. Any shares so acquired by the corporation may be held and may be disposed of at such times, in such manner and for such consideration as the board of directors shall determine.'"

After reviewing the facts and some of plaintiff's contentions, the court said:

" . . . . While the provisions under consideration go very far we are not prepared to say that they are illegal or contrary to public policy.

"These provisions do not fall within that classification of acts which are inherently forbidden to any corporation because of the nature of the structure and operation of a corporation. (See, for example, Whittenton Mills v. Upton, 10 Gray. 582, holding that a corporation cannot enter into a partnership.) Contracts whereby a corporation is given the right to call the stock owned by an employee on the termination of his employment, even if the employment can be terminated at the will of the corporation, are not uncommon and have generally been enforced. Arentsen v. Sherman Towel Service Corp., 352 Ill. 327, 185 N.E. 822; Harker v. Ralston Purina Co., 7 Cir., 45 F. 2d 929. See Winchell v. Plywood Corp., 324 Mass. 171, 85 N.E. 2d 313. And the fact, as here, that the price is to be fixed at the book value as of a certain date would not impair the validity of the provision in question, if otherwise valid. Winchell v. Plywood Corp., 324 Mass. 171, 85 N.E. 2d 313. See New England Trust Co. v. Abbott, 162 Mass. 148, 153, 38 N.E. 432, 27 L.R.A. 271; Kraus v. Kuechler, 300 Mass. 346, 349, 15 N.E. 2d 207, 117 A.L.R. 1355.

"We must look then to the statutes to see if they forbid the call of common stock in the circumstances obtaining here. G.L. (Ter. Ed.) c. 156, § 14, authorizes a business corporation to issue 'two or more classes of stock with such preferences, voting powers, restrictions and qualification thereof' as shall be fixed in the agreement of association or articles of incorporation or by an amendment to such agreement or articles. This section permits the issue of preferred stock as well as common, see Hurley v. Boston Railroad Holding Co., 315 Mass. 591, 603, 54 N.E. 2d 183, and, although it does not specifically authorize the call of preferred stock, provisions permitting this in articles of organization are very common and are not unlawful. See Crimmins & Peirce Co. v. Kidder Peabody Acceptance Corp.,

282 Mass. 367, 375-376, 185 N.E. 383, 88 A.L.R. 1122; Weidenfeld v. Northern Pacific Railway, 8 Cir., 129 F. 305; Fletcher, Cyc. Corporations, §5309. With respect to common stock the statute is likewise silent on the matter of callability. The authority to issue common stock subject to call so far as our statutes are concerned would seem to stand on the same footing as in the case of preferred stock. A call provision is quite as much a 'restriction' or 'qualification' within the purview of § 14 in the one case as in the other. The absence of any definite limitation on the power to impose 'restrictions' or 'qualifications' indicates that considerable latitude was intended; and they are not to be declared invalid 'unless palpably unreasonable.' Longyear v. Hardman, 219 Mass. 405, 408, 106 N.E. 1012, 1013; Brown v. Little Brown & Co., 269 Mass. 102, 110, 168 N.E. 521, 66 A.L.R. 1284.

"We do not understand that the plaintiff contends that the call provision is expressly forbidden by statute. But he does contend that it is contrary to the policy of our corporation statutes because it places the stockholders under the domination of the directors, and destroys their independence in exercising the duties and rights conferred by those statutes. But it must be kept in mind that even a valid provision cannot be exercised oppressively or for the purpose of discriminating against a single stockholder or group of stockholders. Adams v. Protective Union Co., 210 Mass. 172, 96 N.E. 74; Albert E. Touchet, Inc., v. Touchet, 264 Mass. 499, 163 N.E. 184. Hence the exercise of the power here involved for purposes of reprisal, spite or other motives tending to show bad faith would be an abuse of the power and would not stand. The arguments of the plaintiff would appear to be directed not to the validity of the power exercised in good faith but rather to its exercise in bad faith. Here there is an express finding by the judge that the directors in calling the plaintiff's stock acted in good faith.

"Nor do we think the inherent nature of common stock is such as to be incompatible with a call provision of the sort under consideration. A shareholder is free to purchase or not as he pleases. He buys with an eye to investment and profit. But if he acquires stock on terms whereby his investment may be temporary and his profits short-lived he has assented in advance to such terms and we see no reason why he may not do so. He gets what he bargained for and if the call provision is exercised he is in no position to complain. Longyear v. Hardman, 219 Mass. 405, 409, 106 N.E. 1012. Opinion of the Justices 261 Mass. 523,

548, 159 N.E. 55. Most of the stock here involved was acquired by the plaintiff subject to the challenged provisions. Some of his shares, it is true, were owned by him prior to the amendment of the agreement of association and articles of organization but he voted for the amendment and twice thereafter voted to readopt it.

"The plaintiff argues that the call provision constitutes an unreasonable restraint on alienation. In support of this position he cites Greene v. E. H. Rollins & Sons, 22 Del. Ch. 394, 2 A. 2d 249, which struck down as an unreasonable restraint on alienation a clause in a corporation's certificate of incorporation authorizing the board of directors to call at any time the common stock of any shareholder who was not an employee. The rationale of that decision was that stock subject to such a provision would be difficult to dispose of. But we are not disposed to adopt that view. The provision here affects the quality of the common stock rather than its alienability. Doubtless, stock subject to such a provision would not be as readily marketable as stock without that limitation. But the same could be said of provisions restricting the transfer of stock, the validity of which have been upheld by this court. Longyear v. Hardman, 219 Mass. 405, 106 N.E. 1012 (provision prohibiting transfer except upon the consent of three fourths of the capital stock), and the cases cited in the footnote on page 5 upholding restrictions on the transfer of stock unless the stock is first offered to the corporation. See Prindiville v. Johnson & Higgins, 92 N.J. Eq. 515, 113 A. 915.

"We hold, therefore, that the challenged provision is not contrary to the corporation laws of the Commonwealth nor to public policy and in the circumstances obtaining here was validly exercised."

RECENT MOTOR CARRIER DECISION ON WHAT CONSTITUTES "PRIVATE" HAULING

(Scott v. I.C.C., 213 F. 2d 300)

This case may be of interest to cooperatives as bearing upon their transportation, marketing, and distribution activities. It points out that mere legal ownership of products at the time of transportation is not necessarily controlling in determining whether the hauler is acting as a contract carrier or private carrier under the Motor Carrier Act, 49 U.S.C. 303(a) (14, 15, 17), 306(a)(1), 309(a)(1),322(b).

Scott, the defendant, was engaged in transporting petroleum products. He owned 18 trucks having capacity in excess of 135,000 gallons, employed 40 to 50 persons, but maintained no bulk storage tanks to store or own any petroleum products except as delivered into his trucks at the refinery. He purchased petroleum products only for immediate and direct delivery to customers. His delivery charge was cost of the products plus an additional charge, which was less than the cost of transportation by common carriers, but he bore losses due to lack of quality, shortage, spoilage, and customer's failure to accept delivery. The court held he was a contract carrier, even though title to the products was vested in him at time of transportation.

After setting forth the pertinent sections of the law and outlining the essential elements of the complaint and answer, the court said:

> "The question presented for determination is one of classification under the Act, supra. It is whether Scott falls within the class of a contract carrier, within the meaning of section 203(a) (15), or that of a private carrier, within the meaning of section 203(a) (17). Where there are controverted issues of material fact in a case of this kind, the burden rests upon the Commission to show by a preponderance of the evidence that the character of the business of the carrier is such as to bring him within the class of a common carrier or a contract carrier. Taylor v. Interstate Commerce Commission, 9 Cir., 209 F. 2d 353, certiorari denied, 74 S. Ct. 677; Interstate

Commerce Commission v. Tank Car Oil Corp., D.C., 60 F. Supp. 133, affirmed, 5 Cir., 151 F. 2d 834. But in this case the material facts are without dispute or controversy. And therefore the question of classification becomes one of law. Brooks Transport Co. v. United States, D.C., 93 F. Supp. 517, affirmed 340 U.S. 925, 71 S. Ct. 501, 95 L. Ed. 668.

"The uncontroverted evidence adduced upon the trial tended to show these facts. Scott resides in Albuquerque, New Mexico. At one time he owned and operated an oil business in Albuquerque, and in connection therewith his facilities included a bulk plant and tanks for the storage of petroleum products. Several years before the institution of this action, he sold that business, and since that time it has been operated under different management and ownership. Sometime after the sale of such business, Scott obtained in due course a certificate of convenience and necessity authorizing him to engage in the transportation in intrastate commerce of bulk petroleum products in certain counties in New Mexico. Later, he sought and obtained authority in due form of law to operate as a common carrier of petroleum and petroleum products in trucks from points and places in New Mexico to other points and places in that state. And during the times involved here, he did transport such products in tank trucks between points of origin and points of destination within New Mexico. Scott was the successful bidder to sell and deliver to the Holloman Airbase in New Mexico, between December 1, 1951, and May, 1952, 625,000 gallons of fuel oil; and he performed the contract on his part by purchasing the product from a refinery in New Mexico, transporting it by tank trucks to the airbase, and there delivering it. Scott entered into a written contract with Shell Oil Company, a distributor of gasoline and other petroleum products, in which he agreed to sell to such company at delivered prices large quantities of first structure gasoline, second structure gasoline, diesel fuel, and stove oil. The contract specified base delivered prices at twelve points in Arizona and two in New Mexico. The delivered prices included federal and state taxes, and the prices were to vary from time to time with the prices fixed by the Platt Oilgram Chart. By its terms, the contract provided that payment for all products delivered during each calendar month should be made on or before the fifteenth of the succeeding month. And it further provided that it should be in effect from February 1, 1952, to January 31, 1954, unless terminated in the meantime, and should continue after January 31, 1954, unless terminated by one of the parties giving to the other at least thirty days' notice. A few days after the contract between Scott and Shell Oil Company became effective, Scott

entered into a contract with New Mexico Asphalt and Refinery Company in which he agreed to purchase from the refinery company, f. o. b. the loading racks of its refinery in Artesia, New Mexico, large quantities of first structure gasoline, second structure gasoline, diesel oil, and stove oil. The contract provided that the prices to be paid for such products should be the usual and customary prices as established and quoted by Platt's Oilgram Service. It further provided that all products purchased during any calendar month should be paid for on or before the fifteenth of the following month, and that if payment was made within ten days after purchase a discount of one per cent should be allowed. And it further provided that it should be in force and effect until March 31, 1954, unless terminated sooner in the manner therein specified. Acting pursuant to these contractual arrangements, Scott obtains gasoline and other petroleum products from the refinery company at its refinery in New Mexico, transports such products by tank trucks operated on the highways to points in Arizona and there delivers them to Shell Oil Company. In each instance, there is a specific order from the Shell Oil Company for the products before they are loaded. The order is sent to Scott prior to the obtaining of the load. After receipt of an order from Shell Oil Company, an order to the refinery is prepared in the offices of Scott at Artesia. This order is sent with the truck to the refinery and the truck is loaded accordingly. After being loaded, the tank is sealed with a refinery seal. The refinery prepares an invoice of the load and charges it to Scott. The destination in Arizona of each load is known to the refinery company. Scott then prepares his invoice to Shell Oil Company. Taxes are paid on the refinery invoice. Delivery of the products is made from the trucks directly to the storage tanks or station tanks of Shell Oil Company. The products are purchased at the refinery at the public posted prices, f. o. b. the refinery; and they are delivered at the fixed delivered prices. Scott has eight or nine other customers, some in Arizona and some in Colorado, for whom he purchases and to whom he sells petroleum products; and the accounts of such customers are handled substantially in the same general manner as that of the Shell Oil Company. Scott maintains at Artesia an office where his records are kept and a garage for the storage, repair, and maintenance of his trucks. The office and garage are in the same building. He owns and operates approximately 18 trucks and trailer tanks for the transportation of gasoline and other petroleum products, and such trucks have a combined carrying capacity in excess of 135,000 gallons. He employs approximately 40 to 50 persons. About 35 of such persons are truck drivers, 6 are machinists or repair men in the garage, 1 is a loader who drives the trucks from the garage to the refinery and checks the load, 2 are dispatchers, and 2 are office helpers. He does not maintain any fixed storage tanks and does not own or use in any manner bulk storage tanks. He

does not store or own any petroleum products except as they are delivered into his trucks at the refinery. He does not purchase gasoline or other petroleum products except for immediate transportation and delivery to customers; and he sells nothing that he does not deliver directly. His delivered charge is the cost of the products at the refinery plus an additional charge which is comparable to but less than the cost of transportation by a common carrier. He bears the loss from the failure of the products to meet quality requirements, loss from shortages, loss from spoilage, and loss from the failure of the customer to accept delivery. But he does not perform any service from which he could gain a profit except the service of transportation. When these uncontroverted facts and circumstances are considered in their entirety, we share with the trial court the view that the primary business of Scott is the transportation in interstate commerce of gasoline and other petroleum products under individual contracts or agreements for compensation and that other phases or features of his business are incidental and secondary to that of such transportation.

"In challenging the judgment, Scott places emphasis upon the point that he purchases the gasoline and other products from the refinery company in Artesia; that title to such products thereupon vests in him; that it remains in him until the products are delivered to Shell Oil Company or other purchasers from him; and that therefore he transports his own property. It is argued in support of the point that Scott bears all loss of gasoline or other products by way of leakage or otherwise occurring before delivery is made to his customer. But Scott's legal ownership of the products at the time of their transportation is not necessarily controlling in determining whether he acts as a contract carrier or a private carrier. His acquisition of the legal title to the products at the time they are received from the refinery and his parting with such title at the time of the delivery of the products does not necessarily as a rule of thumb entitle him to be classified as a private carrier. Interstate Commerce Commission v. Tank Car Oil Corp., 5 Cir., 151 F. 2d 834.

"Scott's primary business being that of transporting by motor vehicle in interstate commerce gasoline and other petroleum products under individual contracts or agreements for compensation, he falls within the class of a contract carrier, even though title to such products is vested in him at the time of their transportation. A. W. Stickle & Co. v. Interstate Commerce Commission, 10 Cir., 128 F. 2d 155, certiorari denied 317 U.S. 650, 63 S. Ct. 46, 87 L. Ed. 523."

SOCIAL SECURITY EXTENDED TO COTTON GINS

Since the status of cotton gins and their employees as respects social security taxes was discussed in Summary No. 51, p. 13 (September 1951), it seems advisable to report here the changes made by the Social Security Amendments of 1954, Pub. L. 761, 83rd Cong. (68 Stat. 1052).

Under the amended law, effective January 1, 1955, services performed in connection with the ginning of cotton are covered under social security and cotton gins and their employees will be subject to the social security taxes. Every person, including the manager, bookkeeper, yardmen, and others, on the gin's payroll is covered, if he is paid at least $100 in cash during any calendar year. The gin will be required to withhold 2 percent of the first $4,200 of wages paid each employee and pay a like amount of tax itself.

Managers who are compensated on a basis of percentage of business or profit are also covered and will make deduction as they receive compensation for their work.

Although the special exemption of gins has been eliminated from the law, services performed in their employ still come within the definition of agricultural labor. Accordingly, as a general proposition gins will not be required to withhold income tax on wages paid.

Each employer is required to maintain adequate records regarding payroll subject to social security taxes, including records for each individual employee. Information on records requirements and collection and payment of the tax may be obtained from the local director of Internal Revenue. Information as to benefits under the law may be obtained from the nearest local Social Security office.

SUPREME COURT DECLINES TO REVIEW DRESSED POULTRY DECISION

(I.C.C. v. Allen E. Kroblin, Inc., 75 S. Ct. 49)

On October 14, 1954, the Supreme Court declined to review the decision of the Eighth Circuit Court of Appeals (212 F. 2d 555), reported in Summary No. 60, p. 22, which held that New York dressed and eviscerated poultry is not a "manufactured product" but is an agricultural commodity within the meaning of 49 U.S.C. 303(b)(6) of the Interstate Commerce Commission Act. Accordingly, that decision now stands as final.